FILED
AUG 5 1983

No. 82-1980

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

HELEN SMITH,
Petitioner,

vs.

FRED H. HARMSEN, et al.,
Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COTCHETT, DYER & ILLSTON
SUSAN ILLSTON
COUNSEL OF RECORD
JOSEPH W. COTCHETT
Bank Cal Building
4 West Fourth Avenue
Suite 500
San Mateo, California 94402
(415) 342-9000
LAW OFFICES OF
GERALD R. SCHMELZER
Attorneys for Plaintiffs and Respondents

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-3300

TABLE OF CASES CITED

	Page
Anderson v. Francis I. duPont and Co., 291 F.Supp. 705 (D.Minn. 1968)	3
Chiarella v. United States, 445 U.S. 222 (1980)	3
Dirks v. Securities & Exchange Commission, ... U.S. ....., 51 U.S.L.W. 5123 (July 1, 1983)	1, 2, 3, 4
Strong v. France, 474 F.2d 747 (9th Cir. 1973)	3

No. 82-1980

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

HELEN SMITH,
Petitioner,

vs.

FRED H. HARMSEN, et al.,
Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Helen Smith has filed a Supplemental Brief in support of her petition for certiorari. That brief inexplicably but repeatedly misstates the holdings of this Court's recent decision in *Dirks v. Securities & Exchange Commission.*[1] The *Dirks* discussion of aider/abettor liability is in fact entirely consistent with the analysis made by the Ninth Circuit in the instant case, and petitioner's claims to the contrary are at best disingenuous. This Supplemental Brief in Opposition is submitted pursuant to Rule 22.6.

Petitioner contends that "this court's decision in *Dirks* re-confirms that the requisites for primary liability under § 10(b) and Rule 10b-5 apply equally to causes of action

[1] . . U.S. . . , 51 U.S.L.W. 5123 (July 1, 1983)

premised on secondary violations of securities laws." (Supplemental Brief, p. 2) Petitioner claims that the *Dirks* case held that the same duty-to-disclose requirement necessary to primary insider trading liability under § 10(b) applies to secondary liability under that rule. Petitioner states that the *Dirks* case held as follows:

> Absent a duty to disclose arising from the relationship between the parties to the transaction, a broker-dealer cannot be held liable for aiding and abetting violations of insider trading rules by failing to disclose material nonpublic information.
>
> (Supplemental Brief, p. 3)

Based upon this premise, petitioner contends that the Ninth Circuit decision was in error.

However, petitioner's interpretation of *Dirks* is contrary to the plain language of that decision. In *Dirks,* this Court analyzed aiding/abetting liability under Rule 10b-5 in the context of tippee liability for trading on inside information. The Court's primary analysis centered on whether and when the "disclose-or-abstain" rule applied to an aiding/abetting (non-insider) tippee.

This Court made it quite clear that "the tippee's duty to disclose or abstain is *derivative from* that of the insider's duty." 51 U.S.L.W., at 5126. Therefore, "In determining whether a tippee is under an obligation to disclose or abstain, it is thus necessary to determine whether the insider's 'tip' constituted a breach of the insider's fiduciary duty . . . And absent a breach by the insider, there is no derivative [tippee] breach." 51 U.S.L.W., at 5127. The Court summarized as follows: "[W]e believe that there

must be a breach of the insider's fiduciary duty before the tippee inherits the duty to disclose or abstain." 51 U.S.L.W., at 5128.

Thus, this Court stated plainly and repeatedly that the secondary liability of a tippee such as *Dirks* turns on the breach of a duty by the insider/tipper—the primary violator. The "relationship" which is important is the relationship between the shareholders or plaintiffs and the primary violator. *If* that relationship gives rise to a fiduciary duty to disclose, then the secondary violator "assumes" (at 5127) or "inherits" (at 5128) or "acquires" (at 5127, n.23) that duty as a derivative matter.

This is precisely the analysis made by the Ninth Circuit in the *Harmsen* case:

> Shannon and Toft also argue that aider and abettor liability cannot be applied to them because they were under no duty to disclose to USNB shareholders. *Chiarella v. United States*, 445 U.S. 222, 100 S. Ct. 1108 (1980). This contention blurs the distinction between primary and secondary violations of section 10(b). While C. Arnholt's duty to disclose arises from his position in the bank and his relationship to the shareholders, *Id.* at 227-228, 100 S.Ct. at 1114, the secondary violator's duty arises from "knowing assistance of or participation in a fraudulent scheme." *Strong v. France*, 474 F.2d 747, 752 (9th Cir. 1973) (quoting *Anderson v. Francis I. duPont and Co.*, 291 F.Supp. 705, 709 (D.Minn. 1968)).
>
> (Petition, App. at 20-21)

This statement is identical in substance to this Court's standard in *Dirks:*

> Thus, a tippee assumes a fiduciary duty as the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.
>
> (51 U.S.L.W. at 5127)

It is respectfully submitted that the Ninth Circuit's decision below was consistent with this Court's holdings in *Dirks*. The petition for certiorari should be denied.

Dated: August 5, 1983

Respectfully submitted,

COTCHETT, DYER & ILLSTON
SUSAN ILLSTON
JOSEPH W. COTCHETT
LAW OFFICES OF
GERALD R. SCHMELZER
Attorneys for Plaintiffs and Respondents